UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

PENDLETON FLOUR MILLS, LLC.

and Case 36-CA-9601

BAKERY, CONFECTIONARY, TOBACCO WORKERS AND GRAINMILLERS LOCAL 98G, affiliated with BAKERY, CONFECTIONARY, TOBACCO WORKERS AND GRAINMILLERS INTERNATIONAL UNION, AFL-CIO

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of Portland, Oregon, for the General Counsel.

Adam S. Collier, Esq.,
of Portland, Oregon, for the Respondent.

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me at Pendleton, Oregon, on December, 7, 2004,[1] upon the General Counsel's complaint which alleged that the Respondent discharged James Pace in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* The Respondent is also alleged to have threatened employees with plant closure in violation of Section 8(a)(1).

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that Pace was discharged for good cause – that he had refused to perform his assigned job.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law and recommended order:

[1] All dates are in 2004, unless otherwise indicated.

I. Jurisdiction

The Respondent is an Oregon corporation engaged in the business of operating a flour mill, in connection with which it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of Oregon, and sells and ships goods or provides services to customers within the State of Oregon valued in excess of $50,000, which customers are engaged in interstate commerce by other than indirect means. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the Act.

II. The Labor Organization Involved

Bakery, Confectionary, Tobacco Workers and Grainmillers Local 98G, affiliated with Bakery, Confectionary, Tobacco Workers and Grainmillers International Union, AFL-CIO (herein the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Facts.

For many years the Union has represented a unit (of now approximately 25) of the Respondent's Pendleton mill employees and has had successive collective bargaining agreements covering those employees. An agreement between the parties (a portion of which is in evidence) was effective until August 31, 2002. The parties extended it for one year and continued negotiations, which concluded with an agreement sometime in June.

Apparently unhappy with progress of negotiations and the Respondent's bargaining position, on April 3 some members of the Union had a rally in a local park to generate public support for their cause. This resulted in a local newspaper article on April 4 for which Jim Pace, the shop steward, and two other employees were interviewed and quoted. On April 7, the local newspaper had another article concerning charges the Union had filed with the NLRB regional office, wherein the Union alleged the Respondent attempted to decertify the Union. Again Pace was interviewed and quoted.

Pace was the regular truck driver, with Danny Brewer as his backup on those occasions when Pace was unavailable. One of the regular delivery/pickup stops made by Pace (or Brewer) was nearby prison where the Respondent had arranged to have its totes cleaned in the prison laundry. These are large sacks which hold about 2000 pounds of flour.

Though Pace did not testify, all witnesses agree that he never drove his truck onto the prison grounds. In fact he steadfastly refused to do so because, as his supervisor Jeanne Scott testified, "his brother used to work out there, and his brother had been barred from out there, and he felt that it was an unjust barring and people who still worked out there were responsible for his brother being fired, and he would not go in there."

When Pace was to make a delivery (or pickup) of totes at the prison, he would call in advance, get an appointment and when he arrived, one of the guards would come out and load or unload the truck. This was not only satisfactory, but was preferred by the guards. Guard Lawrence Steinmen testified that trucks entering the prison grounds must be searched and this takes about 20 minutes. Thus, for the tote pickup and deliveries, it is

much faster and easier for the guard to come outside. Though Pace would sometimes have to wait to be unloaded, apparently this was generally offset by the time he did not have to spend having his truck searched.

There are two guards in the shakedown area were deliveries are made. One can go outside if the other is in the area to watch the prisoners. On April 19, Steinmen's fellow guard was absent, thus when Pace made the call for an appointment, he was told that he would have to drive the truck onto the grounds. Pace went to Scott and "said he had called out there and talked to the laundry, and they said that there was only one man working in the laundry that day, and he couldn't bring the totes to the back gate, so he would have to come into the prison to pick them up, and Jim said he wasn't going in the prison to pick them up because of what they had done to his brother. So he just told me that I would need to make other arrangements to have someone else go pick them up." She told Pace that "we did didn't have another available truck driver at that time, and so he would have to go do it. . . ." Scott testified that she and Pace went back and forth on this, and finally, after checking with her superiors, she suspended Pace. Later in the day, Brewer in fact made the prison run, though in doing so, the line on which he was working had to be shut down.

The Respondent's management then undertook to investigate the matter, which included an interview with Pace two days later. During this interview, Pace said that Scott had misunderstood him. He said then that the reason he would not make the run was because he did not have a security clearance and it would have taken 24 hours to get one. (Actually, according to Steinmen, a clearance can be obtained in 20 minutes, though prison officials would prefer a full day.)

Because of Pace's adamant refusal to make the prison pickup and then his misstatement about the reason he gave Scott, he was discharged.

B. Analysis and Concluding Findings

1. The Discharge of Pace.

The General Counsel argues that the asserted reason for discharging Pace was a pretext to disguise the Respondent's true motive a) because he had refused to drive into the prison for at least several months and b) in any event, he could not have gone onto the prison grounds because he had no clearance. Therefore, asserts the General Counsel, the true reason for ordering him to make the pickup on April 19 instead of arranging for a substitute must have been the fact that Pace was the Union's steward and was quoted in the newspaper both after the rally on April 3 and in connection with filing a charge. It follows that his discharge was violative of the Act. For the following reasons I reject this argument.

Although the prison guards had accommodated Pace's desire not to set foot on the prison grounds, the credible testimony Steinmen leads me to conclude that such was also an accommodation to the guards. And from the testimony of Steinmen, I conclude that on April 19, it was necessary for the Respondent's truck to drive into the prison to make the tote pickup. Thus ordering Pace to make the run was not really a change in the practice he had been accustomed to but a change in circumstances. Although in the past Brewer sometimes made the prison run, it is undisputed that on April 19, at least until after Pace was suspended, Brewer was unavailable. Further, Pace was not qualified to replace Brewer, according to the credible testimony of plant manager Nathaniel Neufeld. When later in the day Brewer in fact went to the prison, the production line on which he was working

was shut down. Further from the testimony of Scott, whom I credit and whose testimony is undenied, never before had Pace refused to make a run because he would not go on the prison grounds.

The General Counsel argues that because Pace was known to have an "idiosyncratic reason" for not going on the prison grounds, for the Respondent to order him to do so on April 19, and its discipline of him for refusing, was a pretext to disguise its true motive. Also in support of the pretext argument, the General Counsel stated, "Despite her full knowledge that Pace did not have the required background clearance and consequently *could* not enter the prison, Scott refused to allow Brewer to make the run." (General Counsel's emphasis.)

No doubt Pace's idiosyncrasy was known, but his refusal to enter the prison was as much to the benefit of the guards as to suave his grudge. Further, there is no evidence that Pace's feelings were ever before an issue, or that someone had to fill in for him when he refused to go on the prison grounds. Though there is testimony that Brewer made deliveries, perhaps as often as once a week and he testified that only he of the truck drivers had a security clearance, Scott testified that Pace in fact had never actually refused to make a run because of his resentment. On this I specifically credit Scott and conclude that since Pace did not testify he would have agreed.[2] Finally, Pace actually could have obtained a clearance on April 19 had he chosen to obey the order of Scott and his subsequent argument (not made to Scott on April 19) that he had no clearance was clearly bogus.

I do not believe that ordering Pace to make the delivery on April 19 was a pretext nor was the Respondent's decision to discharge him for refusing to do so. Certainly the Respondent could have relieved Pace of the duty to drive the truck to the prison, but I find no basis in law that it had to do so – whether or not Pace was active in the Union. In fact, during the investigation interview, according to Scott, Pace said "that he never refused to go to the prison. He said he was just only trying to explain to me how he didn't have the security check." To this Scott accused him of lying. In fact, he had made no attempt to get a clearance prior to his suspension, but did get one the day after.

I note also that Scott made every effort to get Pace to make the run on April 19. Such are not the actions of one trying to set up an employee for a pretextual discharge.

In addition to a lack of pretext evidence there is no evidence of animus toward the Union by the Respondent in general or any of the officials involved. The parties have had a collective bargaining relationship for many years, were in negotiations at the time of these events and ultimately reached agreement. Indeed, the plant manager told Scott that Pace could file a grievance over having to go into the prison, but he would have to obey the order.

I reject the argument that Pace was treated unlawfully because another employee who had failed to show up for an overtime day was suspended for just one day. Scott testified that the other employee, Greg Bach, called in to say he had tried to get a replacement for the overtime for which he was scheduled and could not, and he would not be in. When later meeting with Scott, "he totally admitted he was wrong, he admitted he shouldn't have done it, took responsibility for his actions . . . ." Conversely, at his interview

[2] See, e.g., *Prototype Plastics, Inc.,* 284 NLRB 711, 715 (1987) and cases cited permitting an adverse inference where, without explanation, a material witness available to a party is not called to testify.

Pace lied, stating that he had told Scott the reason he could not make the prison run was his lack of a clearance. I conclude the Respondent could reasonably treat these situations differently.

Finally, I note that other employees were involved in the rally and newspaper articles and were not disciplined in any way. Pace was active on behalf of the Union, as the steward and one of two employees on the bargaining committee; however, there is no evidence to suggest he would be singled out for retribution in these roles. In sum, I conclude that the General Counsel failed to establish, even prima facie, that Pace was discharged in violation of the Act.

2. The Alleged Threat.

This allegation is based on a statement by human resources manager Jason Michael to the effect that if the plant shut down, people would lose their jobs. Such was the testimony of Jack Legore and Gene Marker and was not denied. However, it appears to have been an observation in a context which had to do with a potential investigation of the plant by some health and workplace agency. Apparently a week or two later, OSHA did make an inspection of the plant.

Legore testified that Michael "made a comment that from the – I don't know if it was from the flier (announcing the rally but also referring to safety) or from a newspaper clipping or something about fire marshals coming and OSHA was going to come in, and they'd end up shutting us down." Similarly, Marker testified: "Jason (Michael) had evidently found out about the fliers, and he got pretty upset about it, and said that I hope Jim Pace knows what he's doing. He's going to get this place shut down. And that the fire marshal and DEQ (an agency not specifically identified on the record) was going to shut us down, and that we shouldn't be airing this out in public, and then he use pretty choice words to –"

I find Michael's observation to be protected by Section 8(c) and did not contain a threat that the Respondent would take action against employees because they engaged in union or other protected activity. Indeed, the focus of Michael's statement had to do with some kind of safety complaint alleged in the flyer, and not the contract negotiations or the rally per se. However, even if this statement by Michael could be considered a threat, it was too de minimus on which to base a remedial order.[3]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [4]

[3] See, *American Federation of Musicians, Local 76, AFL-CIO (Jimmy Wakely Show),* 202 NLRB 620 (1973) and cases cited.

[4] If no exceptions are filed as provided by Sec.102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec 102.48 of the Rules, be adopted by the board and all objections to them shall be deemed waived for all purposes

ORDER

The Complaint is dismissed in its entirety.

Dated, San Francisco, California, March 17, 2005.

James L. Rose
Administrative Law Judge